(8)

No. 93-1543

In the Supreme Court of the United States

OCTOBER TERM, 1994

CHRISTINE MCKENNON, PETITIONER

v.

NASHVILLE BANNER PUBLISHING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

DREW S. DAYS, III
Solicitor General

DEVAL L. PATRICK
Assistant Attorney General

PAUL BENDER
Deputy Solicitor General

KENT L. JONES
Assistant to the Solicitor General

DENNIS J. DIMSEY
MARK L. GROSS
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

JAMES R. NEELY, JR.
Deputy General Counsel

GWENDOLYN YOUNG REAMS
Associate General Counsel

CAROLYN L. WHEELER
Assistant General Counsel

DORI K. BERNSTEIN
Attorney
Equal Employment Opportunity Commission
Washington, D.C. 20507

34 pp

QUESTION PRESENTED

Whether an employee who is discharged in violation of the Age Discrimination in Employment Act is barred from obtaining any remedy if, solely as a result of the unlawful discharge and the litigation challenging it, the employer discovers a lawful basis for dismissal.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1543

CHRISTINE MCKENNON, PETITIONER

v.

NASHVILLE BANNER PUBLISHING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

This case concerns the proper interpretation of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 621 *et seq.* The decision in this case is also likely to affect litigation under analogous provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The Attorney General and the Equal Employment Opportunity Commission share substantial responsibilities for enforcement of these equal employment opportunity laws. The Court's decision in this case will affect those responsibilities.

STATEMENT

1. Petitioner Christine McKennon began working for the Nashville Banner Publishing Company (Banner) in 1951. She was discharged by that company on October 31, 1990, after more than 39 years of service. She was 62 years old at that time. Pet. App. 10a-11a. During her tenure at the Banner, petitioner held several secretarial positions. "[O]ver the years the company consistently evaluated her work performance as excellent." *Id.* at 2a. At the time she was terminated, petitioner was secretary to the Banner's comptroller. The company claimed that it fired petitioner because it needed to reduce the size of its work force. *Id.* at 10a-11a.

In May, 1991, petitioner commenced this suit, alleging that her discharge was in violation of the Age Discrimination in Employment Act (ADEA), which makes it unlawful for an employer (29 U.S.C. 623(a)(1)):

> to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

Petitioner alleged that she and one other secretary—the two oldest secretaries at the Banner—were terminated while five younger secretaries with less seniority were retained. Compl. ¶ 14. Petitioner sought a variety of legal and equitable remedies, including backpay, liquidated damages and attorneys' fees. Compl. ¶ 8.

2. During a deposition made in the course of this litigation, petitioner testified that, during her last year of employment at the Banner, she had copied several confidential documents to which she had access in her capacity as the comptroller's secretary. Pet. App. 11a. She did this because she feared that her employer was preparing to discharge her because of her age. Pet. App. 8a, 12a. She

took copies of the documents home with her in order to discuss them with her husband. She testified that she did so "for her 'insurance' and 'protection,' 'in an attempt to learn information' regarding my job security concerns." *Id.* at 12a; see Compl. ¶ 9.

On December 21, 1991, two days after these disclosures at her deposition, and fourteen months after her discharge, the publisher of the Banner sent petitioner a letter "terminating" her employment. Pet. App. 12a. In this letter, and also in an affidavit filed in connection with a motion for summary judgment thereafter filed by respondent, the publisher stated that petitioner's removal and disclosure of these confidential documents was a breach of her job responsibilities and that "the Banner would have discharged Mrs. McKennon when she took and copied the records if it had then known that she had done so." *Id.* at 2a-3a. Other officers of the Banner filed similar affidavits. *Id.* at 3a n.3.

3. The district court granted respondent's motion for summary judgment. Pet. App. 10a-18a. In doing so, the court relied on the "after-acquired evidence" defense articulated by the Sixth and the Tenth Circuits in some cases arising under the ADEA and under Title VII of the Civil Rights Act of 1964. Pet. App. 13a, citing *Summers* v. *State Farm Mutual Automobile Ins. Co.*, 864 F.2d 700 (10th Cir. 1988), and *Johnson* v. *Honeywell Information Systems, Inc.*, 955 F.2d 409 (6th Cir. 1992).

The district court concluded that it was undisputed in the record that petitioner's actions in copying and disclosing respondent's confidential documents violated her "duty of confidentiality" and "established just cause for firing Mrs. McKennon" (Pet. App. 16a). The court accepted the affidavit of respondent's publisher that he "would have terminated her immediately had he learned of her misconduct at any time prior to her discharge from the

Banner on October 31, 1990" (*ibid.*). For these reasons the court held that petitioner was not entitled to "any relief or remedy" under the ADEA. *Id.* at 14a, quoting *Johnson* v. *Honeywell Information Systems, Inc.*, 955 F.2d at 415. The court concluded that the "after-acquired evidence" "serves as a complete defense to a wrongful discharge action" under the ADEA. Pet. App. 16a.

4. The court of appeals affirmed (Pet. App. 1a-9a). It agreed that this case is governed by the circuit's "after-acquired evidence" doctrine. The court noted that it had first adopted this doctrine in a case arising under state law (*Johnson* v. *Honeywell Information Systems, Inc., supra*) and had subsequently applied the doctrine as a complete defense in a case involving a claim of sex discrimination under Title VII (*Milligan-Jensen* v. *Michigan Technological Univ.*, 975 F.2d 302 (6th Cir. 1992), cert. granted, 113 S. Ct. 2991, cert. dismissed, 114 S. Ct. 22 (1993)). The court stated that, "in *Johnson* and *Milligan-Jensen,* we have firmly endorsed the principle that after-acquired evidence is a complete bar to any recovery by the former employee where the employer can show it would have fired the employee on the basis of the evidence" (Pet. App. 6a). The court concluded that the uncontroverted facts established that "Mrs. McKennon was guilty of conduct which, if known by the Banner, would have caused her discharge" (*id.* at 3a). The court held that this evidence constituted a complete defense to petitioner's cause of action under the ADEA for the employer's unlawful discharge of her on account of her age. *Id.* at 3a-9a. The court of appeals rejected petitioner's argument that the doctrine should not be applied when the asserted misconduct occurred as part of the employee's effort to protect herself against a discriminatory termination. The court held that issue to be "irrelevant" because "[t]he sole issue in after-acquired evidence cases is whether the employer would have fired the

* * * employee on the basis of the misconduct had it known of the misconduct" (*id.* at 9a).[1]

SUMMARY OF ARGUMENT

In view of the disposition of this case below on motion for summary judgment, it must be assumed that respondent unlawfully fired petitioner because of her age. This discharge violated the Age Discrimination in Employment Act, which makes it "unlawful for an employer * * * to discharge any individual * * * because of such individual's age" (29 U.S.C. 623(a)(1)).

When an unlawful discriminatory discharge in violation of the ADEA has occurred, the statute authorizes the court to grant "such legal or equitable relief as may be appropriate to effectuate the purposes of [the ADEA], including without limitation judgments compelling employment, reinstatement or promotion" or backpay. 29 U.S.C. 626(b). The court of appeals' conclusion, that all relief must be withheld if there is evidence establishing that the employee would have been discharged for a reason unknown to the employer at the time the unlawful discharge

[1] The court of appeals noted that 29 U.S.C. 623(d) makes it unlawful for an employer to discriminate against an employee who "has opposed any practice made unlawful by this section" (*ibid.*), but stated that "[c]opying and removing confidential documents is clearly not protected conduct" under this statute. Pet. App. 8a n.7.

The petition does not appear to contend that the provisions of 29 U.S.C. 623(d) justify petitioner's conduct on the facts of this case. Instead, we understand the petition to address the legal question whether after-acquired evidence that would have constituted a lawful "basis for dismissal" bars an employee "from obtaining any remedy" under the ADEA for a discharge that was in fact unlawful. See Pet. i. Accordingly, we do not address in this brief the question whether a discharge motivated solely by petitioner's copying of these confidential documents represented unlawful retaliation under 29 U.S.C. 623(d).

occurred, is inconsistent with the language and purpose of this important remedial provision.

In order to grant appropriate relief for a discriminatory discharge a court should, insofar as possible, design a remedy that will reinforce the strong federal policy of discouraging employment discrimination. A court should also endeavor to insure that an employee who has been the victim of discrimination is not left in a substantially worse position as a result of that discrimination. For these reasons, "after-acquired evidence" of employee misconduct should, in no event, constitute a complete bar to relief for unlawful discrimination. Where an employer can satisfy the substantial burden of showing that it would actually have discharged the employee on the basis of the after-acquired evidence had it not committed its prior discriminatory discharge, it may, however, be appropriate not to order reinstatement and to limit the backpay award so that backpay is not awarded for any period after the lawful discharge would have occurred.

This case should therefore be remanded for the district court to determine whether petitioner's discharge was in fact unlawful and, if so, what legal and equitable relief is appropriate. In addition to backpay and possible reinstatement, liquidated damages, declaratory relief, injunctive relief and attorney's fees are all appropriate remedies under the ADEA even in the presence of after-acquired evidence of employee misconduct.

ARGUMENT

I. THE ADEA AUTHORIZES FEDERAL COURTS TO AWARD BACKPAY AND OTHER APPROPRIATE RELIEF WHEN AN EMPLOYEE IS DISCHARGED BECAUSE OF AGE

In view of the court of appeals' affirmance of the district court's grant of summary judgment for respondent

in this case, it must be assumed that respondent fired petitioner because of her age.[2] Pet. App. 3a. Such a discriminatory discharge plainly violated the Age Discrimination in Employment Act, which makes it "unlawful for an employer * * * to discharge any individual * * * because of such individual's age" (29 U.S.C. 623(a)(1)).

The court of appeals nonetheless held that the employer was absolved of liability under the ADEA for the discriminatory discharge because, more than one year after that discharge occurred, the employer learned of employee misconduct that had nothing to do with the discharge. In reaching that conclusion, the court relied (Pet. App. 6a) on its conclusion in *Milligan-Jensen* v. *Michigan Technological Univ.* that such "after-acquired evidence" makes it "irrelevant whether or not [the employee] was discriminated against" (975 F.2d at 305). In the court's view (Pet. App. 6a), such "after-acquired evidence" constitutes a complete defense to liability for a discriminatory discharge under the ADEA and also under the non-discrimination requirements of Title VII of the Civil Rights Act of 1964.[3]

---

[2] The court of appeals noted that there is "substantial deposition testimony of Mrs. McKennon that she was indeed discharged because of age" (Pet. App. 3a n.2). While respondent disputed this claim (*ibid.*), respondent also acknowledged that the claim of discrimination must be assumed to be true for purposes of respondent's motion for summary judgment. *Id.* at 3a.

[3] Variants of the after-acquired evidence doctrine invoked by the courts of appeals have been applied to age, race, religion and gender discrimination claims under the ADEA and Title VII. See Pet. App. 6a; *O'Driscoll* v. *Hercules Inc.*, 12 F.3d 176, 177 (10th Cir. 1994); *Kristufek* v. *Hussmann Foodservice Co.*, 985 F.2d 364, 365 (7th Cir. 1993); *Milligan-Jensen* v. *Michigan Technological Univ.*, 975 F.2d 302 (6th Cir. 1992), cert. granted, 113 S. Ct. 2991, cert. dismissed, 114 S. Ct. 22 (1993); *Washington* v. *Lake County*, 969 F.2d 250, 251 (7th Cir. 1992); *Wallace* v. *Dunn Construction Co.*, 968 F.2d 1174, 1176 (11th Cir. 1992). The doctrine is also potentially applicable to other federal laws that prohibit discrimination against employees (*e.g.*, National Labor Relations Act, 29 U.S.C. 160(c); Americans with Disabilities Act, 42 U.S.C. 12101; Equal Pay Act, 29 U.S.C. 206(d).

The decision of the court of appeals departs from both the language and the policy of the ADEA and Title VII. With respect to remedies, the ADEA incorporates by reference the remedial provisions of the Fair Labor Standards Act (FLSA). 29 U.S.C. 626(b). When an unlawful discharge has occurred, the ADEA thus authorizes reinstatement, backpay, injunctive and declaratory relief and attorneys' fees. *Ibid.*; 29 U.S.C. 216(b), 217. See also *Lorillard* v. *Pons,* 434 U.S. 575, 584 (1978). The ADEA also authorizes an additional award of liquidated damages, in an amount equal to the backpay award, "in cases of willful violations" of that Act. 29 U.S.C. 626(b). The ADEA further specifies that courts have jurisdiction to "grant such legal or equitable relief as may be appropriate to effectuate the purposes of [the Act], including without limitation judgments compelling employment, reinstatement or promotion" (*ibid.*).

The substantive prohibition of age discrimination in the ADEA is modelled upon the substantive provisions of Title VII of the Civil Rights Act of 1964, which prohibit discrimination in employment based on race, color, sex, national origin, or religion. 42 U.S.C. 2000e *et seq.* *Lorillard* v. *Pons,* 434 U.S. at 584; *Trans World Airlines, Inc.* v. *Thurston,* 469 U.S. 111, 121 (1985). Under Title VII, as under the ADEA and the FLSA, unlawful discrimination in employment is to be remedied by reinstatement, backpay, injunctive, declaratory and other relief. As under the ADEA, Title VII authorizes federal courts to "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay * * *, or any other equitable relief as the court deems appropriate." 42 U.S.C. 2000e-5(g)(1). Title VII contains only one limitation on such relief: "[n]o order of the court shall require * * * reinstatement, * * * or * * * backpay" if the employee was "discharged for any reason other than discrimination." 42 U.S.C. 2000e-5(g)(2)(A).

When an employee is discharged because of discrimination based on age, race, sex, color, national origin, or religion, the discharge is unlawful and appropriate relief must be fashioned. Although reinstatement and backpay are not to be ordered if the employee was discharged for a reason other than discrimination, after-acquired information—information that was not known to the employer at the time of its unlawful discrimination—obviously cannot establish that a person was discharged for such a reason. See *Price Waterhouse* v. *Hopkins,* 490 U.S. 228, 252 (1989) ("An employer may not * * * prevail * * * by offering a legitimate and sufficient reason for its decision *if that reason did not motivate it at the time of the decision.*") (plurality opinion) (emphasis added); see also *id.* at 260-261 (White, J., concurring); *id.*, at 261 (O'Connor, J., concurring); *Kristufek* v. *Hussmann Foodservice Co.,* 985 F.2d 364, 369 (7th Cir. 1993) (the unlawful character of a "discriminatory firing must be decided solely with respect to the known circumstances leading to the discharge" and "is not changed by some after discovered alternate reason for discharge which might otherwise have been used, but was not"); *Wallace* v. *Dunn Construction Co.,* 968 F.2d 1174, 1178 (11th Cir. 1992). Cf. *Smallwood* v. *United Air Lines, Inc.,* 728 F.2d 614, 624 (4th Cir.) (evidence of applicant's misconduct that would have been discovered during hiring process if the applicant had not been unlawfully rejected was relevant only to determination of proper remedy under ADEA), cert. denied, 469 U.S. 832 (1984). "After-acquired evidence" thus does not negate the fact that the employer in this case violated the ADEA by discharging petitioner because of her age, nor does it remove the statutory responsibility of the district court to award "appro-

priate" relief to plaintiff—including backpay and reinstatement, if appropriate—for the employer's unlawful behavior.

Although the ADEA and Title VII authorize federal courts to exercise discretion in determining relief under those statutes, that discretion must be exercised in a manner that results in "the most complete achievement" of remedial objectives "that is attainable under the facts and circumstances of the specific case." *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 770-771 (1976). Federal courts have "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Id.* at 770; *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975); *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965). This is not to say that courts are precluded, despite the discovery of after-acquired evidence, from imposing any limits upon the nature and scope of relief for a discharge based on an unlawful employment practice. The issue that this case presents is what relief remains appropriate under the ADEA and Title VII when, after an employee is unlawfully discharged, evidence of employee misconduct is subsequently discovered.

II. THE DENIAL OF ALL RELIEF FOR A DISCRIMINATORY DISCHARGE IS NOT APPROPRIATE UNDER THE ADEA

1. The ADEA was enacted to eliminate the practice of discrimination against older workers in employment. See, *e.g.*, H.R. Rep. No. 805, 90th Cong., 1st Sess. (1967); S. Rep. No. 723, 90th Cong., 1st Sess. (1967). In enacting the ADEA, Congress relied significantly on the prohibitions of Title VII, enacted three years earlier. "[T]he ADEA and Title VII share a common purpose, the elimination of discrimination in the workplace." *Oscar Mayer & Co.* v.

Evans, 441 U.S. 750, 756 (1979). See also *Lorillard* v. *Pons*, 434 U.S. 575, 584 (1978). The fashioning of appropriate remedies for violation of these statutes "invokes the sound equitable discretion of the district courts" (*Franks* v. *Bowman Transportation Co.*, 424 U.S. at 770). Application of that discretion in a particular case involves, not the court's "inclination, but . . . its judgment; and its judgment is to be guided by sound legal principles." *Ibid.*, quoting *Albemarle Paper Co.* v. *Moody*, 422 U.S. at 416, quoting *United States* v. *Burr*, 25 F. Cas. 30, 35 (C.C. Va. 1807) (No. 14,629d) (Marshall, C.J.). In particular, the remedy selected must "be measured against the purposes which inform" the statute. *Albemarle Paper Co.* v. *Moody*, 422 U.S. at 417.

A "primary objective" of Title VII and the ADEA is a "prophylactic one." *Albemarle Paper Co.* v. *Moody*, 422 U.S. at 417. The remedial measures were included in the statutes to serve as a "spur or catalyst" to cause "employers and unions to self-examine and self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges" of discrimination. *Id.* at 417-418, quoting *United States* v. *N.L. Industries, Inc.*, 479 F.2d 354, 379 (8th Cir. 1973). The statutes are also designed "to make persons whole for injuries suffered on account of unlawful employment discrimination," *Albemarle Paper Co.* v. *Moody*, 422 U.S. at 418. An award of backpay to an employee who has been fired because of discrimination is presumptively an appropriate remedy, for it "has an obvious connection" with these two statutory purposes. *Id.* at 417, 418. The Court has therefore held (*id.* at 421):

> [G]iven a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the

economy and making persons whole for injuries suffered through past discrimination.[4]

This conclusion flows, not only from the text and object of Title VII and the ADEA, but also from their legislative histories, which provide "emphatic confirmation" (*Franks* v. *Bowman Transportation Co.*, 424 U.S. at 764) that Congress intended courts to "exercis[e] their equitable powers to fashion the most complete relief possible" for employment discrimination (Section-by-Section analysis of H.R. 1746, accompanying the Equal Employment Opportunity Act of 1972, Conf. Rep., 118 Cong. Rec. 7166, 7168 (1972)).

---

[4] In *Albemarle Paper Co.* v. *Moody*, the Court noted that the discretion to deny relief for a Title VII violation is limited and that a district court must "carefully articulate its reasons" for declining to award backpay in a particular case. 422 U.S. at 421 n.14. Following *Albemarle*, and prior to the recent development of the "after-acquired evidence" defense, district courts rarely exercised their discretion to deny relief under Title VII. See B. Schlei and P. Grossman, *Employment Discrimination Law* at 526-527 (2d ed., Five-Year Cum. Supp.).

In *Los Angeles Dep't of Water & Power* v. *Manhart*, which involved application to pension plans of Title VII's prohibition of sex discrimination, the Court held that retroactive relief in the form of refunds to female contributors to the plan was not required. 435 U.S. 702, 721-723 (1978). The Court based that determination on three factors—that the conclusion that differential pension contributions based on sex violated Title VII was in significant doubt before the litigation began, that there was no indication that these plans would be modified following *Manhart* only under the threat of backpay awards, and that ordering retroactive monetary relief could have a "devastating" effect on the solvency of pension plans. *Ibid.* Similarly, in *Arizona Governing Committee* v. *Norris*, 463 U.S. 1073 (1983), the Court denied retroactive monetary relief under circumstances, similar to those in *Manhart*, in which Title VII had not previously been applied to the challenged pension practice and where retroactive application could have serious financial effects on the plans and on the expectations of individuals who had contributed to them over the years. See *id.* at 1105-1106 (Powell, J., dissenting in part and concurring in part).

The circumstances in *Norris* and *Manhart* are the only instances in which this Court has excused an employer who violated Title VII from the responsibility of restoring economic losses that an act of proven discrimination caused its victim. The circumstances that justified the unusual denial of relief in *Norris* and *Manhart* are not present here.

The remedies provided by the ADEA reflect, even more clearly than those available under Title VII, the statute's prophylactic objectives. Backpay is a mandatory remedy under the ADEA. *Lorillard* v. *Pons*, 434 U.S. at 584 n.13. Moreover, unlike Title VII, which did not make punitive damages available until that statute was amended in 1991 (*Landgraf* v. *USI Film Products*, 114 S. Ct. 1483, 1490-1492 (1994)), the ADEA has, from its first enactment, authorized an award of "liquidated" damages—in an additional amount equal to the backpay award—for "willful violations" of that Act. 29 U.S.C. 626(b).

2. In the present case, the court of appeals concluded that, even when the discharge of an employee is an act of unlawful age discrimination, judgment must nevertheless be entered for the employer (and *all* relief for the unlawful discharge denied) whenever the employer subsequently learns of misconduct that would have led to the discharge of the employee, had the employer known of the misconduct. This holding incorrectly prevents the federal judiciary from exercising its statutory responsibility to award backpay and other appropriate relief in cases in which unlawful discrimination has occurred.

The "after-acquired evidence" doctrine was first formulated by the Tenth Circuit in *Summers* v. *State Farm Mutual Automobile Ins. Co.*, 864 F.2d 700 (1988). The *Summers* court allowed an employer charged with a discriminatory firing to defend on the basis of information which, if known by the employer at the time of discharge, would have justified discharge and would have in fact led to discharge.[5] *Id.* at 708. The court acknowledged that

---

[5] Summers was a field claim representative for State Farm Insurance Company. He sued his employer, claiming that he had been

"such after-acquired evidence cannot be said to have been a 'cause' " of the employee's discharge. *Ibid.* The court nevertheless granted summary judgment for the employer, on the ground that "after-acquired evidence" "preclude[s] the grant of any present relief or remedy" because the employee has not been injured by the discrimination.[6]

---

discharged unlawfully on the basis of his age and religion. 864 F.2d at 701-702. Summers had a history of falsifying claim forms, for which he had received repeated warnings and a period of probation. *Ibid.* The stated reason for his termination was his generally unsatisfactory job performance. *Id.* at 708. During trial preparation, State Farm discovered more than 150 previously unknown false claim records, including 18 occurrences after Summers had returned to work from probationary status. *Id.* at 703. This "after-acquired evidence" of employee misconduct was relied on by the district court in granting summary judgment for State Farm. *Id.* at 703, 708.

[6] The court erred in *Summers* in relying (864 F.2d at 704-705) on *Mt. Healthy City School District Board of Educ.* v. *Doyle,* 429 U.S. 274 (1977), for the proposition that the employer should prevail whenever "after-acquired evidence" establishes that the employer would have reached the same decision for valid, lawful reasons. In *Mt. Healthy,* the Board of Education fired the plaintiff from his job as a teacher for a series of incidents of which the Board disapproved, including arguments with other teachers (one culminating in his being slapped by another teacher), an argument with cafeteria workers, and arguments and obscene gestures directed at students. The Board also disapproved of plaintiff's calling a radio program and discussing a Board-required dress code. Plaintiff contended that his call to the radio show was protected by the First Amendment, and could not legally be the basis of a decision to fire him. This Court vacated a lower court decision reinstating plaintiff with backpay, holding that if the other incidents, independent of the radio incident, supported the decision to fire him, he was not entitled to relief (*id.* at 287). Unlike the situation in *Summers* and the present case, this Court's focus in *Mt. Healthy* was on the reasons that motivated the Board *at the time it made its decision not to rehire the plaintiff,* not on a hypothetical decision that could or would have been made. See *ibid.* See also *Wallace* v.

Ibid. See also *Milligan-Jensen* v. *Michigan Technological Univ.,* 975 F.2d at 304-305 ("if the plaintiff would not have been hired, or would have been fired, if the employer had known of the falsification, the plaintiff suffered no legal damages by being fired * * * [and] it becomes irrelevant whether or not she was discriminated against").

Although courts applying the after-acquired evidence doctrine often purport to assume liability and to address only the availability of relief (see *Summers,* 864 F.2d at 708), in practice those courts that treat the doctrine as a complete defense entirely negate liability by denying the possibility of any relief.[7] Under the doctrine, the employer's

---

Dunn Constr. Co., 968 F.2d at 1179 ("*Mt. Healthy* and related principles actually subvert, rather than support, the [*Summers*] rule.").

This Court subsequently emphasized in *Price Waterhouse* v. *Hopkins,* 490 U.S. 228 (1989), that an employer must show that legitimate reasons *actually* motivated it *at the time* it made the employment decision under review in order to escape a finding of unlawful discrimination. "[P]roving 'that the same decision would have been justified . . . is not the same as proving that the same decision would have been made.' An employer may not * * * prevail in a mixed motives case by offering a legitimate and sufficient reason for its decision *if that reason did not motivate it at the time of the decision.*" *Id.* at 252 (emphasis added and citations omitted).

[7] An alternative rationale for the "after-acquired evidence" defense incorrectly seeks to apply the equitable doctrine of clean hands to charges of unlawful employment discrimination. In *Perma Life Mufflers, Inc.* v. *International Parts Corp.,* 392 U.S. 134 (1968), the Court permitted an antitrust action to proceed despite the fact that plaintiffs had participated in the illegal practice, noting that "[w]e have often indicated the inappropriateness of invoking broad common-law barriers to relief where a private suit serves important public purposes." *Id.* at 138. Other courts have similarly noted that "equitable doctrines should not have been applied where their application will defeat the purpose of a statute." *Mitchell Bros. Film Group* v. *Cinema Adult*

discrimination is thus said to be "irrelevant" (Pet. App. 6a) because the victim is said to be "entitled to no relief" (*Summers* v. *State Farm Mutual Automobile Ins. Co.*, 864 F.2d at 708). Even assuming that after-acquired evidence would in some cases have provided a reason for a discharge had no discrimination taken place, treating such evidence as a complete defense to the award of relief for employment discrimination that actually occurred ignores and obstructs the strong public policy goals of the ADEA and Title VII.[8] Allowing "after-acquired evidence" completely

Theater, 604 F.2d 852, 862 (5th Cir. 1979). See also *Calloway* v. *Partners Nat. Health Plans*, 986 F.2d 446, 450-452 (11th Cir. 1993) (refusing to apply the "clean hands" doctrine to bar relief in fair employment litigation); *EEOC* v. *Recruit U.S.A., Inc.*, 939 F.2d 746, 753-755 (9th Cir. 1991) (same). Application of the clean hands doctrine to bar all relief for discrimination where an employer discovers evidence of employee misconduct would substantially frustrate the deterrent and remedial objectives of Title VII. See *Wallace* v. *Dunn Construction Co.*, 968 F.2d at 1181 n.10; Robert J. Gregory, *The Use of After-Acquired Evidence in Employment Discrimination Cases: Should the Guilty Employer Go Free?* 9 The Labor Lawyer 43, 64-66 (1993). Moreover, under the ADEA backpay is a required, legal remedy (*Lorillard* v. *Pons*, 434 U.S. at 523) which an "equitable" doctrine of "clean hands" cannot negate.

[8] The Seventh Circuit has explained the analytical flaw in treating "after-acquired evidence" as a defense to liability for unlawful discrimination. See *Kristufek* v. *Hussmann Foodservice*, 985 F.2d 364, 369 (1993) ("A discriminatory firing must be decided solely with respect to the known circumstances leading to the discharge. * * * The deterring statutory penalty is for retaliatory firing, the character of which is not changed by some after discovered alternate reason for discharge which might otherwise have been used, but was not."); *Smith* v. *General Scanning, Inc.*, 876 F.2d 1315 (1989) (district court's narrow focus on after-acquired evidence that employee falsely claimed on his resume to have requisite college degree "distracted from the real issue in this case[,] the lawfulness of Smith's termination"; after-discovered resume fraud was "irrelevant" to the central question "[w]hether GSI discriminated against Smith").

to absolve an employer from liability under Title VII or the ADEA directly conflicts with the statutory goal of requiring employers "to self-examine and to self-evaluate their employment practices" and to identify and end discriminatory practices (*Albemarle Paper Co.* v. *Moody*, 422 U.S. at 418). As the Eleventh Circuit stated in *Wallace* v. *Dunn Construction Co.*, 968 F.2d 1174 (1992), employers can be expected to regard the after-acquired evidence defense as an invitation (*id.* at 1180):

> to establish ludicrously low thresholds for "legitimate" termination and to devote fewer resources to preventing discrimination because *Summers* gives them the option to escape all liability by rummaging through an unlawfully-discharged employee's background for flaws and then manufacturing a "legitimate" reason for the discharge that fits the flaws in the employee's background.

Assertion of the after-acquired evidence defense on a motion for summary judgment—before an adjudication of the claimed discrimination can take place—also enables an employer wholly to avoid public exposure of its discriminatory practices.[9] In addition to removing an im-

[9] The recent proliferation of district court decisions adjudicating summary judgment motions predicated on the after-acquired evidence defense suggests how wide-ranging this application of the doctrine can become. See, *e.g.*, *Bonger* v. *American Water Works*, 789 F. Supp. 1102, 1107 (D. Colo. 1992); *O'Day* v. *McDonnell Douglas Helicopter Co.*, 784 F. Supp. 1466 (D. Ariz. 1992), appeal pending, No. 92-15625 (9th Cir.); *DeVoe* v. *Medi-Dyn, Inc.*, 782 F. Supp. 546 (D. Kan. 1992); *Benson* v. *Quanex*, 58 Fair Empl. Prac. Cas. (BNA) 743 (E.D. Mich. 1992); *Churchman* v. *Pinkerton's Inc.*, 756 F. Supp. 515 (D. Kan. 1991); *Punahele* v. *United Air Lines, Inc.*, 756 F. Supp. 487 (D. Colo. 1991); *O'Driscoll* v. *Hercules, Inc.*, 745 F. Supp. 656 (D. Utah 1990), aff'd, 12 F.3d 176 (10th Cir. 1994); *Mathis* v. *Boeing Military Airplane Co.*, 719 F. Supp. 991 (D. Kan. 1989); see also

portant incentive to obey the law, the defense as thus applied frustrates the statutory objective of focussing public awareness on unlawful employment practices. *Id.* at 1180-1181.[10]

Seizing upon this opportunity to evade exposure, adjudication, and responsibility for illegally discriminatory practices, employers now routinely embark upon extensive, post-discharge investigations designed to uncover some theoretically valid post hoc justification for terminating an employee who has brought a claim of unlawful discrimination, instead of conducting the self-examination and correction of unlawful practices that Title VII and the ADEA are designed to require. See W. Waldo & R. Mahar, *Lost Cause and Found Defense: Using Evidence Discovered* after *an Employee's Discharge to Bar Discrimination Claims,* 9 Labor Lawyer 31, 32 n.1, 41 (1993) (suggesting that the search by employers for after-acquired evidence is now the "[m]ost important" first step upon learning of a discrimination complaint). The large number of recent cases in which employers have offered "after-acquired evidence" in order to attempt to avoid liability for allegedly discriminatory actions indicates the destructive impact the doctrine can have on antidiscrimination goals.[11]

Washington v. *Lake County,* 969 F.2d at 254 n.3 (citing unpublished cases).

[10] See Zemelman, *The After-Acquired Evidence Defense to Employment Discrimination Claims: The Privatization of Title VII and the Contours of Social Responsibility,* 46 Stan. L. Rev. 175, 202 (1993) (by ignoring the fact that the discharge was unlawful, the courts that apply the after-acquired evidence defense "fail to expose and punish discrimination when it actually motivated the employer").

[11] The potential for abuse of the after-acquired evidence defense, particularly at the summary judgment stage, has been acknowledged even by those circuits that have recognized the defense. See *Johnson*

Reliance on after-acquired evidence to deny relief to victims of unlawful employment discrimination also frustrates the goal of the federal nondiscrimination statutes to make "persons whole for injuries suffered on account of unlawful employment discrimination" (*Albemarle Paper Co.* v. *Moody,* 422 U.S. at 417-418). If all relief for a discriminatory discharge is precluded by after-acquired evidence, many employees will be left in a substantially worse position than if discrimination had never occurred. As the Eleventh Circuit pointed out in *Wallace* v. *Dunn Construction Co.,* reliance on after-acquired evidence to deprive an employee of all relief ignores the fact that the employee "would have remained employed for at least some period of time after he was actually discharged" (968 F.2d at 1179-1180). The after-acquired evidence defense conflicts with the make-whole objective of Title VII and the ADEA because it "ignores the lapse of time between the [discriminatory] employment decision and the discovery of a legitimate motive for that decision." *Id.* at 1179.

---

v. *Honeywell Information Systems, Inc.,* 955 F.2d 409, 414 (6th Cir. 1992) (noting the need "to prevent an employer from combing a discharged employee's record for evidence of any and all misrepresentations, no matter how minor or trivial, in an effort to avoid legal responsibility for an otherwise impermissible discharge"); *Reed* v. *Amax Coal Co.,* 971 F.2d 1295, 1298 (7th Cir. 1992) (noting need "to prevent employers from avoiding Title VII liability by pointing to minor rule violations which may technically subject the employee to dismissal but would not, in fact, result in discharge").

Despite such admonitions, district courts have granted summary judgment based upon "after-acquired evidence" supported by no more than the self-serving affidavit of a company official or supervisor stating that the employer would have fired the employee had it been aware of the hypothetical basis for dismissal. See, *e.g.*, *Washington* v. *Lake County,* 969 F.2d at 256-257; *Bonger* v. *American Water Works,* 789 F. Supp. at 1107; *O'Day* v. *McDonnell-Douglas,* 784 F. Supp. at 1469; *O'Driscoll* v. *Hercules,* 745 F. Supp. at 659.

3. In determining the appropriate relief for an unlawful discharge, federal courts are to seek "the most complete achievement of the objectives of Title VII" (*Franks* v. *Bowman Transportation Co.*, 424 U.S. at 770-771) or the ADEA. When an employee is discriminatorily (and therefore unlawfully) discharged, the fact that valid reasons for a termination are thereafter discovered may in some cases be a proper basis for limiting the backpay period. It may also in some circumstances be a reason for rejecting reinstatement as a remedy. Such "after-acquired evidence" does not, however, ordinarily justify the complete and automatic denial of backpay and reinstatement.[12] Denying all backpay almost inevitably places the employee who has suffered discrimination in a worse economic position because of the discriminatory discharge and, at the same time, allows

[12] See, *e.g.*, R. White & R. Brussack, *The Proper Role of After-Acquired Evidence in Employment Discrimination Litigation*, 35 B.C.L. Rev. 49, 55 (1993). This case does not present the situation, discussed in *Wallace* v. *Dunn Construction Co.*, in which an employer prematurely ends a hiring process for a discriminatory reason but demonstrates that, had the hiring process continued, the employer would have discovered evidence that would have led it to refuse to hire the individual for nondiscriminatory reasons. See 968 F.2d at 1178 n.8. In that situation, the court noted that, although Title VII was violated, backpay or reinstatement would not be granted because the applicant would not in fact have been hired had the hiring process continued properly (*ibid.*). In that factual situation, an employer may thus be able to establish that no loss of employment or wages actually resulted from the discrimination. See, *e.g.*, *Smallwood* v. *United Air Lines, Inc.*, 728 F.2d 614 (4th Cir.), cert. denied, 469 U.S. 832 (1984). Declaratory and injunctive relief against the discriminatory practice may, of course, still be available in appropriate cases of that type. The present case also does not involve the situation, discussed in *Summers*, where an employee obtains a position by misrepresenting an essential job qualification. 864 F.2d at 708 (hypothesizing a false representation on job application that the applicant is a doctor).

the employer to profit from its illegal conduct.[13] A properly tailored backpay remedy is thus almost always appropriate relief for the discriminatory discharge of an employee qualified for the position she held.[14] See *Albemarle*

[13] Cf. *Mt. Healthy City School District Board of Educ.* v. *Doyle*, 429 U.S. 274, 285-286 (1977) (an employee should be "placed in no worse a position than if he had not engaged in the [constitutionally protected] conduct").

[14] A recent amendment to Title VII in the Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1075, codifies the principle that evidence of a lawful basis for an employer's discriminatory conduct is relevant only to the determination of appropriate relief for unlawful discrimination, not to the existence of liability. Section 107 of the 1991 Act reverses decisions holding that an employer who acts with a mixture of discriminatory and nondiscriminatory motives "may avoid a finding of liability" under Title VII (*Price Waterhouse* v. *Hopkins*, 490 U.S. at 258 (plurality opinion)). Under Section 107, when both proper and improper motivations exist for an employment decision, and each separately supports the decision, the court *must* find a violation of Title VII. 42 U.S.C. 2000e-5(g)(2)(B) (Supp. IV 1992). In that situation (where the nondiscriminatory motive was actually a reason for the employment decision), the court may order declaratory or injunctive relief to prevent future similar violations, and attorneys' fees, but may not order "admission, reinstatement, hiring, promotion, or [backpay]" (*ibid.*).

To establish liability under the amended statute, a plaintiff "must demonstrate the discrimination was a 'contributing' factor in the employment decision." 1991 U.S.C.C.A.N. 586 (House Report No. 102-40(I)). Congress enacted the amendment to "clarify that proof that an employer would have made the same employment decision in the absence of discriminatory reasons is relevant to determine not the liability for discriminatory employment practices, but only the appropriate remedy." *Ibid.*

In cases arising after the effective date of the 1991 amendments, the "after-acquired evidence" defense will, if not invalidated, place an employer who was motivated solely by discriminatory factors, but who later learns of a lawful basis for its action, in a far better position than one who harbored both lawful and unlawful motives at the time

Paper Co. v. *Moody*, 422 U.S. at 421, quoting 118 Cong. Rec. 7168 (1972) ("[P]ersons aggrieved by the consequences and effects of the unlawful employment practice [should] be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.") Similarly, the statutory remedies of declaratory relief, injunctive relief prohibiting future discrimination, liquidated damages (for "willful violations") and attorneys' fees would also remain appropriate remedies for a discriminatory discharge (29 U.S.C. 623(a)(1)).[15]

---

of the adverse employment decision. While the wholly discriminatory employer would be able to avoid a determination of liability and any relief by asserting a defense premised on "after-acquired evidence," the employer with mixed motives will be held liable for its discriminatory conduct and may be subject to declaratory or injunctive relief, fees, and costs.

[15] This Court has recently addressed the issue of post-employment misconduct in a related context. In *ABF Freight System, Inc.* v. *NLRB*, 114 S. Ct. 835 (1994), the National Labor Relations Board (NLRB) ordered an employee reinstated to his job, with backpay, after the Board found that his termination was affected by anti-union bias. This order was entered even though the employee was found to have lied both to his employer and to the Board. The Court upheld the order of reinstatement and backpay and rejected the employer's claim that the employee's perjury should automatically disqualify him from both. *Id.* at 840. The Court noted that Congress had vested the Board with discretion to shape relief that "best effectuate[s] the policies of the Act" (*id.* at 839). The Court concluded that it could not "fault the Board's conclusions that [the employee's dishonesty] was ultimately irrelevant to whether antiunion animus actually motivated his discharge and that ordering effective relief in a case of this character promotes a vital public interest." *Id.* at 840.

III. THE APPROPRIATE REMEDIES UNDER THE ADEA FOR A DISCRIMINATORY DISCHARGE FOLLOWED BY THE DISCOVERY OF EVIDENCE THAT WOULD HAVE LED TO A LAWFUL DISCHARGE INCLUDE LIMITED BACKPAY, INJUNCTIVE AND DECLARATORY RELIEF, ATTORNEYS' FEES, AND LIQUIDATED DAMAGES

1. When a discharge of a qualified employee is followed by the discovery of after-acquired evidence of employee misconduct that would have led to a lawful discharge, a limited remedy for the unlawful discharge is appropriate. Consistent with the analysis prescribed in *Price Waterhouse* v. *Hopkins*, 490 U.S. at 252, the district court in this case should first have determined whether respondent acted unlawfully in discharging respondent because of her age. If such unlawful discrimination occurred, declaratory relief and attorneys' fees should always be awarded under 29 U.S.C. 626(b). The court may also grant injunctive relief to enjoin further discriminatory practices unless the employer demonstrates that the discrimination is unlikely to recur. See *EEOC* v. *Harris Cernin, Inc.*, 10 F.3d 1286, 1292 (7th Cir. 1993); *EEOC* v. *Goodyear Aerospace Corp.*, 813 F.2d 1539, 1544 (9th Cir. 1987). If, however, the district court then finds, on the basis of convincing evidence offered by the employer and subject to cross-examination and rebuttal, that the employer, had it not previously discriminated against the employee by discharging her, would have fired her for the misconduct it discovered, the court would then act within its discretion in denying reinstatement or front pay. When an employer thus clearly demonstrates that it would have discharged the employee wholly apart from its discriminatory animus against her, a requirement of reinstatement or front pay "would go beyond making [the employee] whole and would unduly trammel [the employer's] freedom to law-

fully discharge employees." *Wallace* v. *Dunn Construction Co.*, 968 F.2d at 1182. See also *Price Waterhouse* v. *Hopkins*, 490 U.S. at 239.

The burden placed upon the employer in such cases to show that it would have acted lawfully despite its prior discrimination should be a substantial one. The employer must show, in the manner of an affirmative defense, that it *would* have terminated the employee, not merely that grounds existed upon which it lawfully *could* have done so. In the ordinary employment situation, employees may commonly engage in misconduct, such as lateness, on-the-job errors, or other lapses, that may theoretically be a justification for discharge but that have ordinarily been responded to by the employer with lesser sanctions, or none at all. After-acquired evidence of such "misconduct" cannot constitute the required demonstration that the employer would have terminated the employee absent discriminatory animus. In order to make such a demonstration an employer should ordinarily be required to show that other employees, who had not been the objects of discrimination, had been terminated for similar reasons. Nor should an employer be able to escape liability for backpay by relying upon evidence of misconduct that the employer did not discover in the ordinary course of business, but that was unearthed during a search of the employee's record or background that was inspired by, and designed as a response to, the employee's discrimination allegations. Finally, the evidence that a lawful discharge would have occurred must be evaluated in light of the proof that a discriminatory discharge did, in fact, take place, and that evidence must be sufficiently clear and convincing to overcome the inference of bias created by that proof.[16]

[16] Placing the burden with the employer in the manner of an affirmative defense is appropriate in light of the fact that any uncertainty as to whether the employee would have been fired in the absence of discrimination is uncertainty brought about by the employer's discriminatory actions. As the Court noted in an analogous situation under the National Labor Relations Act, "[t]he employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing." *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393, 403 (1993). See also *Director, OWCP* v. *Greenwich Collieries*, No. 93-744 (June 20, 1994), slip op. 11 (reaffirming that the employer bears the burden of persuasion as to affirmative defenses under the National Labor Relations Act).

Where an employer succeeds in meeting its burden of demonstrating that a lawful discharge would have occurred had the prior discriminatory termination not taken place, a limited backpay remedy nonetheless remains appropriate. Awarding backpay to the time when the employee would lawfully have been discharged restores her "to a position where [she] would have been were it not for the unlawful discrimination" (*Albemarle Paper Co.* v. *Moody*, 422 U.S. at 421, quoting 118 Cong. Rec. 7168 (1972)).[17] Terminating backpay on the date that after-acquired evidence would have resulted in such a discharge strikes an appropriate balance between the right of the employee to be free from discrimination under Title VII and the right of the employer to discharge an employee for valid, legitimate reasons. See *Kristufek* v. *Hussmann Foodservice Co.*, 985 F.2d 364 (7th Cir. 1993).[18] The Equal Employment Oppor-

[17] The Eleventh Circuit has suggested, in this context, that the employee's "backpay period should not terminate prematurely unless [the employer] proves that it would have discovered the after-acquired evidence prior to what would otherwise be the end of the backpay period in the absence of the allegedly unlawful acts and this litigation." *Wallace* v. *Dunn Construction Co.*, 968 F.2d at 1182.

[18] Awarding an unlawfully discharged employee backpay to the date on which the employer would have terminated the employee had no discrimination occurred does not nullify any state-law remedy the

tunity Commission (EEOC) has also determined that limited backpay, injunctive and declaratory relief, attorneys' fees, and compensatory damages, if applicable, should be awarded in these circumstances. See EEOC: Revised Enforcement Guide on Recent Developments in Disparate Treatment Theory, 8 Fair Empl. Prac. Man. 405:6915, 6927 (July 7, 1992). See also R. White & R. Brussack, *supra,* at 80-86.

2. In determining whether after-acquired evidence would, in fact, have resulted in a discharge absent any prior discrimination, courts should hesitate to accept unsubstantiated, self-serving and conclusory employer affidavits. See note 11, *supra*. Only in the clearest cases should this remedial issue be addressed in a summary judgment context. The courts below concluded in the present case that the self-serving affidavits of respondent's officers were sufficient to establish, as a matter of undisputed fact, that the discharge of petitioner based on after-acquired evidence was not pretextual. The correctness of those decisions is questionable. This case must, in all events, be remanded for further proceedings at which the remedial issue will be open for reconsideration on a fuller record.

If, on remand, the court finds that petitioner's initial discharge in October, 1990, was discriminatory but that she thereafter would have been lawfully discharged based on after-acquired evidence, the court would then have discretion to deny reinstatement and terminate backpay as of the date the discharge would have occurred absent discrimination. In this situation, declaratory relief, an injunction against future discriminatory practices, liquidated damages

---

employer may have if it was injured by an employee's false representations or other improper conduct. While state laws that conflict with Title VII are preempted, those that do not impede the prohibitions of the statute are unaffected. See, *e.g.*, *Darby* v. *Pasadena Police Dep't*, 939 F.2d 311, 314 (5th Cir. 1991).

(if the initial discharge represented willful discrimination) and attorneys' fees would also constitute appropriate remedies under the ADEA for the employer's unlawful discrimination.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JAMES R. NEELY, JR.
Deputy General Counsel

GWENDOLYN YOUNG REAMS
Associate General Counsel

CAROLYN L. WHEELER
Assistant General Counsel

DORI K. BERNSTEIN
Attorney
Equal Employment Opportunity Commission

DEVAL L. PATRICK
Assistant Attorney General

PAUL BENDER
Deputy Solicitor General

KENT L. JONES
Assistant to the Solicitor General

DENNIS J. DIMSEY
MARK L. GROSS
Attorneys

JULY 1994

☆ U.S. GOVERNMENT PRINTING OFFICE: 1994—301-157/86176